

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2011

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SENATE BILL 33
PROPOSED COMMITTEE SUBSTITUTE S33-CSTG-1 [v.5]

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Short Title: Medical Liability Reforms.

(Public)

Sponsors:

Referred to:

February 3, 2011

1 A BILL TO BE ENTITLED
2 AN ACT TO REFORM THE LAWS RELATING TO MEDICAL LIABILITY BY
3 PROVIDING LIMITED PROTECTION FROM LIABILITY TO THOSE REQUIRED BY
4 FEDERAL LAW TO PROVIDE EMERGENCY MEDICAL CARE, BY AUTHORIZING
5 THE BIFURCATION OF TRIALS ON ISSUES OF LIABILITY AND DAMAGES IN
6 CERTAIN ACTIONS, BY LIMITING THE AMOUNT OF NONECONOMIC
7 DAMAGES THAT MAY BE AWARDED, BY AUTHORIZING THE PERIODIC
8 PAYMENT OF FUTURE ECONOMIC DAMAGES IN LIEU OF A LUMP-SUM
9 PAYMENT, AND BY MODIFYING APPEAL BONDS IN MEDICAL MALPRACTICE
10 ACTIONS.

11 The General Assembly of North Carolina enacts:

12 **SECTION 1.** G.S. 90-21.12 reads as rewritten:

13 "**§ 90-21.12. Standard of health care; limited liability for federally mandated emergency**
14 **medical services.**

15 (a) Except as provided in subsection (b) of this section, in any medical malpractice
16 action, action for damages for personal injury or death arising out of the furnishing or the
17 failure to furnish professional services in the performance of medical, dental, or other health
18 care, the defendant health care provider shall not be liable for the payment of damages unless
19 the trier of the facts finds by the greater weight of the evidence that the care of
20 such health care provider was not in accordance with the standards of practice among members
21 of the same health care profession with similar training and experience situated in the same or
22 similar communities at the time of the alleged act giving rise to the cause of action.

23 (b) In any medical malpractice claim arising out of the furnishing or the failure to
24 furnish services pursuant to obligations imposed by 42 U.S.C. §1395dd for an emergency
25 medical condition as defined in 42 U.S.C. §1395dd(e)(1), the defendant health care provider
26 shall not be liable for the payment of damages unless the trier of fact finds by clear and
27 convincing evidence that the health care provider's deviation from the standard of care required
28 under subsection (a) of this section constituted gross negligence, wanton conduct or intentional
29 wrongdoing. Nothing in this subsection shall be construed to change, alter, override, or
30 otherwise affect the provisions of G.S. 90-21.14, 90-21.15, 90-21.16, or 20-166."

31 **SECTION 2.** G.S. 1A-1, Rule 42(b), reads as rewritten:

32 "(b) Separate trials. –

33 (1) The court may in furtherance of convenience or to avoid prejudice and shall
34 for considerations of venue upon timely motion order a separate trial of any



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claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues.

(2) Upon motion of any party in an action that includes a claim commenced under Article 1G of Chapter 90 of the General Statutes involving a managed care entity as defined in G.S. 90-21.50, the court shall order separate discovery and a separate trial of any claim, cross-claim, counterclaim, or third-party claim against a physician or other medical provider.

(3) Upon motion of any party in a medical malpractice action commenced under Article 1B of Chapter 90 of the General Statutes wherein the plaintiff seeks damages in an amount equal to or greater than seventy-five thousand dollars (\$75,000), the court shall order separate trials for the issue of liability and the issue of damages. Evidence relating solely to compensatory damages shall not be admissible until the trier of fact has determined that the defendant is liable for medical malpractice. The same trier of fact that tried the issues relating to liability shall try the issues relating to damages."

SECTION 3. Article 1B of Chapter 90 of the General Statutes is amended by adding the following new section to read:

"§ 90-21.19. Liability limit for noneconomic damages.

(a) In any medical malpractice action against a health care provider in which the plaintiff is entitled to an award of noneconomic damages, the amount of noneconomic damages for which judgment is entered shall not exceed two hundred fifty thousand dollars (\$250,000) per plaintiff. In the event that any verdict or award of noneconomic damages stated pursuant to G.S. 90-21.19B(1) exceeds two hundred fifty thousand dollars (\$250,000) per plaintiff, the court shall modify the judgment as necessary to conform to the requirements of this subsection.

(b) As used in this section, 'noneconomic damages' means damages to compensate for pain, suffering, emotional distress, loss of consortium, inconvenience, physical impairment, disfigurement, and any other nonpecuniary, compensatory damage. 'Noneconomic damages' does not include punitive damages as defined in G.S. 1D-5.

(c) Any award of damages in a medical malpractice action shall be stated in accordance with G.S. 90-21.19B. If a jury is determining the facts, the court shall not instruct the jury with respect to the limit of noneconomic damages under subsection (a) of this section, and neither the attorney for any party nor a witness shall inform the jury or potential members of the jury panel of that limit."

SECTION 4. Article 1B of Chapter 90 of the General Statutes is amended by adding the following new section to read:

"§ 90-21.19A. Periodic payment of future economic damages in medical malpractice actions.

(a) The following definitions apply in this section:

(1) Future economic damages. – Damages for future expense for medical treatment, care or custody, loss of future earnings, and any other future pecuniary damages of the plaintiff following the date of the verdict or award.

(2) Periodic payments. – The payment of money or delivery of other property to the plaintiff at regular intervals.

(b) In any medical malpractice action, the form of the fact finder's verdict or award of damages, if supported by the evidence, shall indicate specifically what amount is awarded for future economic damages.

(c) Upon the award of future economic damages in any medical malpractice action, the presiding judge shall, at the request of either party, enter a judgment ordering that the future economic damages of the plaintiff be paid in whole or in part by periodic payments rather than by a lump-sum payment if the present value of the future economic damages award is greater

than or equal to seventy-five thousand dollars (\$75,000). In entering a judgment ordering the payment of future economic damages by periodic payments, the court shall make a specific finding as to the dollar amount of the present value of that portion of the future economic damages for which the plaintiff is to be paid by periodic payments. In calculating the total damages upon which any attorney contingency fee for representing the plaintiff in connection with the medical malpractice action is calculated, the present value of any portion of the award representing future economic damages that are to be paid by periodic payments shall be used.

(d) A judgment authorizing periodic payments of future economic damages shall require that such payments be made through the establishment of a trust fund or the purchase of an annuity for the life of the plaintiff or during the continuance of the compensable injury or disability of the plaintiff, in such form and under such terms as shall be approved by the court. The establishment of a trust fund or the purchase of an annuity, as required and approved by the court, shall constitute the satisfaction of the defendant's judgment for future economic damages.

(e) The judgment ordering the payment of future economic damages by periodic payments shall specify the recipient of the payments, the schedule of the periodic payments, and the dollar amount of each periodic payment to be made pursuant to the schedule. The death of the plaintiff terminates liability for payment of future economic damages which by judgment pursuant to this section are required to be paid in periodic payments not yet due, except that the court that entered the original judgment may modify the judgment to provide that liability for payment of future periodic payments compensating the plaintiff for loss of future earnings shall not be terminated by reason of the death of the plaintiff, but shall continue to be paid to persons surviving the plaintiff to whom the plaintiff owed a duty of support pursuant to law immediately prior to the plaintiff's death."

SECTION 5. Article 1B of Chapter 90 of the General Statutes is amended by adding the following new section to read:

"§ 90-21.19B. Verdicts and awards of damages in medical malpractice actions; form.

In any malpractice action, any verdict or award of damages, if supported by the evidence, shall indicate specifically what amount is awarded for each of the following:

- (1) Noneconomic damages.
- (2) Present economic damages.
- (3) Future economic damages.

If applicable, the court shall instruct the jury on the definition of noneconomic damages under G.S. 90-21.19(b) and the definition of future economic damages under G.S. 90-21.19A(a)(1). If applicable, the court shall instruct the jury that present economic damages are those damages for medical treatment, care or custody, loss of earnings, and any other pecuniary damages of the plaintiff up to the date of the verdict or award."

SECTION 6. G.S. 1-289 reads as rewritten:

"§ 1-289. Undertaking to stay execution on money judgment.

(a) If the appeal is from a judgment directing the payment of money, it does not stay the execution of the judgment unless a written undertaking is executed on the part of the appellant, by one or more sureties, to the effect that if the judgment appealed from, or any part thereof, is affirmed, or the appeal is dismissed, the appellant will pay the amount directed to be paid by the judgment, or the part of such amount as to which the judgment shall be affirmed, if affirmed only in part, and all damages which shall be awarded against the appellant upon the appeal, except as provided in ~~subsection (b)~~ subsections (b), b(1) and (b2) of this section. Whenever it is satisfactorily made to appear to the court that since the execution of the undertaking the sureties have become insolvent, the court may, by rule or order, require the appellant to execute, file and serve a new undertaking, as above. In case of neglect to execute such undertaking within twenty days after the service of a copy of the rule or order requiring it, the appeal may, on motion to the court, be dismissed with costs. Whenever it is necessary for a party to an action or proceeding to give a bond or an undertaking with surety or sureties, he

may, in lieu thereof, deposit with the officer into court money to the amount of the bond or undertaking to be given. The court in which the action or proceeding is pending may direct what disposition shall be made of such money pending the action or proceeding. In a case where, by this section, the money is to be deposited with an officer, a judge of the court, upon the application of either party, may, at any time before the deposit is made, order the money deposited in court instead of with the officer; and a deposit made pursuant to such order is of the same effect as if made with the officer. The perfecting of an appeal by giving the undertaking mentioned in this section stays proceedings in the court below upon the judgment appealed from; except when the sale of perishable property is directed, the court below may order the property to be sold and the proceeds thereof to be deposited or invested, to abide the judgment of the appellate court.

(b) If the appellee in a civil action brought under any legal theory obtains a judgment directing the payment or expenditure of money in the amount of twenty five million dollars (\$25,000,000) or more, and the appellant seeks a stay of execution of the judgment within the period of time during which the appellant has the right to pursue appellate review, including discretionary review and certiorari, the amount of the undertaking that the appellant is required to execute to stay execution of the judgment during the entire period of the appeal shall be twenty five million dollars (\$25,000,000).

(b1) In any medical malpractice action as defined in G.S. 90-21.11, in which an appellant is insured under a policy or policies of malpractice liability insurance having limits of coverage applicable to the action in the amount of at least one million dollars (\$1,000,000), the amount of the undertaking that the appellant is required to execute to stay execution of the judgment during the entire period of the appeal shall be the amount of the judgment or the amount of the appellant's medical malpractice insurance coverage applicable to the action, whichever is less.

(b2) In any medical malpractice action as defined in G.S. 90-21.11, in which an appellant is not insured under a policy or policies of malpractice liability insurance, or has less than one million dollars (\$1,000,000) of malpractice liability insurance coverage, the amount of the undertaking that the appellant is required to execute to stay execution of the judgment during the entire period of the appeal shall be the amount of the judgment or one million dollars (\$1,000,000), whichever is less.

(c) If the appellee proves by a preponderance of the evidence that the appellant for whom the undertaking has been limited under ~~subsection (b)~~ subsections (b), (b1) or (b2) of this section is, for the purpose of evading the judgment, (i) dissipating its assets, (ii) secreting its assets, or (iii) diverting its assets outside the jurisdiction of the courts of North Carolina or the federal courts of the United States other than in the ordinary course of business, then the limitation in ~~subsection (b)~~ subsections (b), (b1) or (b2) of this section shall not apply and the appellant shall be required to make an undertaking in the full amount otherwise required by this section."

SECTION 7. If the provisions of Section 3 of this act are declared to be unconstitutional or otherwise invalid by final decision of a court of competent jurisdiction, following any appellate review, then Section 4 and Section 5 of this act are repealed, but the invalidity does not affect other provisions or applications of this act that can be given effect without the invalid provisions or application.

SECTION 8. This act becomes effective October 1, 2011. Sections 1, 3, 4, and 5 apply to causes of action arising on or after the effective date. Sections 2 and 6 apply to actions commenced on or after the effective date.